

STATE OF MICHIGAN
COURT OF APPEALS

SPRUCE RIDGE DEVELOPMENT, L.L.C., and
THE HOLT TRUST,

UNPUBLISHED
June 16, 2009

Petitioners-Appellants,

v

BIG RAPIDS ZONING BOARD OF APPEALS,

No. 281745
Mecosta Circuit Court
LC No. 06-017468-AA

Respondent-Appellee.

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ

PER CURIAM.

Petitioners appeal by leave granted the trial court's October 18, 2007 order affirming respondent Big Rapids Zoning Board of Appeals' (ZBA) denial of petitioners' request for zoning variances. Because we conclude that there were no errors warranting relief, we affirm.

The property in this case was zoned as R-1 residential district and consisted of 35 acres of unimproved land. Petitioners specifically argued at the ZBA hearings that, on the northwest part of the property, they wanted to mix duplexes with single-family structures. They did not specify how many structures would be single-family and how many would be duplexes nor indicate how the mixed structure area would be designed. Petitioners also asserted that they foresaw an assisted living center being built on the southwest portion of the property, which would be adjacent to apartment complexes to the south. Petitioners further indicated that the east half of the property would contain single-family structures with no variances. In addition, eight acres of the property on the east half of the property would not be developed. In order to facilitate this planned development, petitioners requested a use variance to allow the construction and maintenance of duplexes, and requested the two non-use variances to allow the lot size for single-family structures to be reduced from 11,250 square feet to 7,500 square feet and the maximum lot coverage to be increased to 30 percent from 25 percent. However, the ZBA denied the requested variances.

On appeal, petitioners argue that the decision of the ZBA was not supported by competent, material and substantial evidence on the record. Petitioners also argue that the ZBA failed to apply the applicable use and non-use variance standards in rendering its decision.

In considering an appeal from a decision of a ZBA, the circuit court shall review the record and decision to ensure that it is supported by competent, material, and substantial

evidence on the record and that it represents a reasonable exercise of discretion. MCL 125.3606(1)(c), (d). In reviewing the lower court's decision, this Court examines "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA]'s factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). We will not substitute our judgment for that of the ZBA. *C & W Homes, Inc v Livonia Zoning Bd of Appeals*, 25 Mich App 272, 274; 181 NW2d 286 (1970). "The primary reason for this deference to the findings of the board of appeals is obvious—its members are local residents who reside in the township and who possess a much more thorough knowledge of local conditions, current land uses, and the manner of future development desirable for those who reside in the township." *Szluha v Avon Charter Twp*, 128 Mich App 402, 410; 340 NW2d 105 (1983). Variances should be sparingly granted, and "it is not sufficient to show that the property would be worth more or could be more profitably employed if the restrictions were varied to permit another use." *Puritan-Greenfield Improvement Assoc v Leo*, 7 Mich App 659, 668; 153 NW2d 162 (1967).

The decision of the ZBA was supported by competent, material, and substantial evidence on the record; therefore, it should be affirmed. *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002). Petitioners' primary contention was that no market existed in a price range where they could make a profit on the sale of lots developed according to R-1 zoning because of the high infrastructure costs, but the "possibility of increased financial return shall not of itself be deemed sufficient to warrant a variance." Big Rapids Zoning Ordinance, § 13.5:1. Moreover, petitioners did not present specific figures to show how the infrastructure costs would be reduced and how those decreases would impact a reasonable rate of return. In addition, the ZBA noted that the estimated infrastructure costs were based on all of the property being developed and did not exclude the eight acres, which were not going to be developed. Further, the ZBA found that petitioners' inability to get a greater rate of return was primarily due to them paying too much for the property.

In addition to noting these limitations, the ZBA made several findings, applied those findings to the standards for variances, and concluded that the request should not be granted. See Big Rapids Zoning Ordinance, § 13.6:1-13.7:2. The ZBA's decision was based on the information contained in the record before remand, which consisted of 28 documents providing information relating to the property and the petitioners request for variances. In addition, the ZBA considered new information that was presented by petitioners, which included a complete appraisal, photographs, and updates and other factual information. The members of the ZBA also properly relied upon their knowledge of local conditions and current land uses. See *Szluha*, 128 Mich App at 410. Moreover, one of the members of the ZBA was a real estate agent and she noted that there was a weak market for selling property, not just in Big Rapids, but in Michigan, and that there appeared to be no current demand for single-family residential structures or duplexes.

The ZBA also doubted several of the comparisons made by petitioners relating to the price for which the lots would sell. For example, petitioners asserted that the purchase price of a lot on their property would range between \$15,000 and \$20,000 and the "Duray property," which was just north of the subject property, and also zoned R-1, provided a good example of how the purchase price would be lower because the Duray property was comparable to their property and lots on the Duray property sold for approximately \$14,000. The ZBA noted that, although the

Duray property had a variance granted to reduce the lot size to 7,500 square feet, an open area was kept for all the people who lived there to use. The Duray property was also platted. There was water and sewer and rough-in roads, which were already constructed. Thus, the decreased price per lot could be explained because the property was already partially developed. It was further noted that the Duray property was a small piece of property, only 3.4 acres, and allowing a variance on a small piece of property was substantially different than allowing a variance on 35 acres.

Petitioners also asserted that comparable lots in a Sunset Manor subdivision sold for \$13,000, \$16,500 and \$22,000. However, the ZBA did not agree that these were valid comparisons: it noted that the \$13,000 lot had serious surface water problems that prevented it from having a basement and that one of the other lots had serious grading problems. Thus, the ZBA recognized that the decreased price per lot could be explained because there were problems with the properties. Based on the foregoing, the ZBA clearly found that petitioners did not submit “credible” proof that their property would not yield a reasonable return without the requested variances. See *Puritan-Greenfield Improvement Assoc*, 7 Mich App at 667 (stating that the property owner seeking a variance “must show credible proof that the property will not yield a reasonable return if used only for a purpose allowed by the ordinance . . .”).

Petitioners also argue on appeal that in denying the ordinances the ZBA inappropriately relied on the city’s inability to enforce its own zoning ordinance. The ZBA expressed concern about noise and other “trouble” that comes along with duplexes, as opposed to single-family residences, noting that Big Rapids has had difficulty in the past controlling some of the things that go on in duplexes. The concern directly corresponded with the ZBA’s obligation to ensure that public safety is secured, which is an essential element in granting both a use and non-use variance. See Big Rapids Zoning Ordinance, § 13.6:2 and 13.7:2. Thus, consideration of these concerns was not improper.

Petitioners also argue that the ZBA inappropriately required petitioners to have a sketch plan. Although the ordinance does not require petitioners to submit a sketch plan depicting its proposed use for the property, it is apparent from the members’ comments at the hearings and their factual finding regarding the lack of a sketch plan, that the ZBA members were not provided any substantive showing of how the property would actually be developed if the variances were approved. The ZBA was asked to rely on petitioners’ assertions that the northwest portion of the property would be made up of intermittent duplexes and single-family structures and that the southwest portion of the property would potentially contain an assisted living center. The ZBA’s finding about the lack of a sketch plan was not improper considering that it was a comment on the lack of information, i.e., that the ZBA was not provided with any information from which to draw a conclusion as to how the property would actually be developed.

In addition, petitioners argue that the ZBA inappropriately relied on the character of the property at the time of purchase. The character of the property at the time of the purchase was not one of the ZBA’s findings of fact. Moreover, even if the character of the property at the time of the purchase was mentioned during the January and February 2007 hearings, this fact does not diminish that there was competent, material, and substantial evidence on the record to support the ZBA’s ultimate decision. Similarly, petitioners argue that the ZBA inappropriately relied on

petitioners' failure to provide an appraisal of the property at the time of purchase and analyzed the use variance request as a rezoning. The ZBA did make those findings, but regardless of petitioners' assertion that these findings were inappropriate, the ZBA clearly articulated substantial factual findings and applied those findings to the standards for use and non-use variances resulting in there being competent, material, and substantial evidence on the record to support the ZBA's decision. *Janssen*, 252 Mich App at 201; MCL 125.3606(1)(c). The record supports the conclusion that the ZBA's decision represents the reasonable exercise of discretion granted by law to the ZBA. MCL 125.3606(1)(d). In affirming the ZBA's decision, the circuit court applied correct legal principles and did not misapprehend or grossly misapply the substantial evidence test to the ZBA's findings.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly